

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>J. DAVID GOLUB</b>	:	ORDER
	:	DTA NO. 819552
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Years 1991, 1992 and 2001.	:	

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Petitioner, J David Golub, P.O. Box 131721, Staten Island, New York 10313, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1991, 1992 and 2001.

A hearing was scheduled before Administrative Law Judge Dennis Galliher at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on Tuesday, April 20, 2004 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request received June 14, 2004 that the default determination be vacated. On July 14, 2004, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner, J. David Golub, appeared on his own behalf. The Division of Taxation ("the Division") appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. In 1989, petitioner commenced litigation against Kidder, Peabody & Co., Inc. in U.S. District Court for the Southern District of New York. Petitioner alleged that Kidder Peabody had engaged in unauthorized trades in his account with Kidder Peabody. Kidder Peabody asserted that positions in petitioner's account were liquidated to satisfy margin maintenance calls. In 1990, the District Court ordered the parties to arbitrate their differences. Petitioner sought an appeal of this order in the U.S. Court of Appeals for the Second Circuit. However, the Court of Appeals dismissed the appeal because the arbitration order was not appealable. Notwithstanding the District Court's order that petitioner submit his claim to arbitration, he did not do so. Instead, he filed numerous motions and appeals attempting to overcome the order to arbitrate. On September 29, 1992, the District Court enjoined petitioner from any further filings in that court until he submitted to the ordered arbitration.

2.. Ultimately, petitioner's account with Kidder Peabody was liquidated and the net proceeds paid over to petitioner. On his 1991 Federal income tax return, petitioner failed to claim any portion of the proceeds as income. In addition, on his 1991 and 1992 returns, petitioner claimed certain Schedule C deductions as well as net operating loss carryovers. Petitioner was audited by the Internal Revenue Service and assessed additional tax with respect to several items on his Federal returns for the years 1991 and 1992 based upon, as relevant to the instant proceeding, failure to report income from the liquidation of the Kidder Peabody account and disallowance of Schedule C deductions and NOL carryovers.

3. Petitioner challenged the assessments in U.S. Tax Court. However, the court found against petitioner on the issues of the gain on the liquidation of his Kidder Peabody account.

The court held that:

Despite repeated invitations by respondent and by the Court to prove his basis in the stock sold, petitioner has failed to do so. He has left the Court with no choice but to hold him liable on all the proceeds from the sale of the stock [citation omitted]. Petitioner thus may end up paying more in capital gains taxes than he would have if he had provided evidence of basis. But if so, he has only himself to blame. (*Golub v. Commissioner*, 78 TCM 367 [1999].)

Similarly, the court found against petitioner with respect to the issues of his business deductions and net operating loss carryovers, again finding that petitioner had failed to prove that he was entitled to claim the various deductions that he had claimed and, with respect to the net operating loss carryovers, to even address their disallowance at trial. In addition, the court found petitioner's position on these issues to be frivolous and wholly without merit. Accordingly, the court assessed petitioner a \$10,000.00 penalty under section 6673(a) of the Internal Revenue Code. Petitioner's appeal of the Tax Court's decision was dismissed and his motions to vacate the Tax Court's decision and for rehearing were denied (*Golub v. Commissioner of Internal Revenue Service*, 2001 WL 376501 [DC Cir 2001]).

4. Petitioner failed to report these Federal changes as required by section 659 of the Tax Law. However, the Division of Taxation became aware of the changes due to a notification from the Internal Revenue Service. As a result, the Division of Taxation issued notices of additional tax due for the 1991 and 1992 tax years asserting that petitioner owed additional New York State and New York City personal income tax.

5. Petitioner filed a New York State personal income tax return for the 2001 tax year. On said return, petitioner claimed estimated tax payments in an amount which exceeded the amount

in petitioner's estimated tax account. As a result, the Division of Taxation issued a Notice and Demand for Payment of Tax Due asserting that petitioner owed additional tax, penalty and interest for the 2001 tax year.

6. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services. A conference was scheduled for October 16, 2002 but petitioner failed to appear and a default order was issued. At petitioner's request, the default order was vacated and a new conference scheduled. Petitioner again failed to appear and a second default order was issued.

7. On July 7, 2003, the Division of Tax Appeals received a petition from petitioner protesting the notices of additional tax due issued by the Division of Taxation for the years 1991 and 1992 and the Notice and Demand for Payment of Tax Due for the year 2001.

8. The calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated November 18, 2003 to petitioner and to the Division of Taxation advising them to contact each other to set a mutually convenient hearing date during the months of March or April 2004. The Division of Taxation selected the date of April 20, 2004. Petitioner did not respond to the notice.

9. On March 15, 2004, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for April 20, 2004 in Manhattan. By motion dated April 2, 2004, petitioner sought an adjournment of the April 20, 2004 hearing on the grounds that:

1) Material Related Federal Court Proceedings are Pending - See USDC-SDNY Golub v. GE-Kidder, Peabody & Co., Inc. [Docket Number 89 Civ. 5903 (CSH)]

2) Material related proceedings brought by IRS District Counsel are pending and adjourned until such time as constitutional right to confrontation and in-court direct examination of hostile witnesses pursuant to court ordered subpoenas are completed. See attached service of legal process.

3) Prospective motion to vacate the U.S. Tax Court Opinion 78 TCM 367 (Gale) is forthcoming, with concurrent motions for monetary compensatory and punitive damages including a request and demand for declaratory relief before the Second Circuit Court of Appeals. Petitioner's statement, legal argument and attached article are filed in support of this motion and the prospective motions.

Petitioner's motion for adjournment was denied on April 6, 2004.

10. On April 20, 2004 at 10:30 A.M., Administrative Law Judge Dennis M. Galliher called the *Matter of J. David Golub*, involving the petition here at issue. Present was Ms. Neri as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The attorney for the Division of Taxation moved that petitioner be held in default.

11. On May 20, 2004, Administrative Law Judge Galliher issued a determination finding petitioner in default and imposing a \$500.00 frivolous petition penalty pursuant to the provisions of section 3000.21 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.21).

12. On June 10, 2004, petitioner filed an application to vacate the May 20, 2004 default determination. In his application, petitioner neither set forth reasonable cause for his failure to appear at his hearing nor demonstrated that he has a meritorious case. Instead, petitioner stated that he has filed yet another motion with the U.S. Tax Court, this time to vacate the U.S. Court Memo Decision 1999-288 in its entirety on the grounds of fraud.

13. On July 14, 2004, the Division of Taxation filed a letter in opposition to the application to vacate the default determination. In its letter, the Division points out that

petitioner has demonstrated neither an excuse for his failure to appear at hearing nor a meritorious case.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.15[b][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Petitioner has failed to demonstrate that he had reasonable cause for his failure to appear for his hearing. Petitioner requested an adjournment of his hearing so that he could file yet another frivolous motion in U.S. Tax Court. Petitioner’s request for adjournment was properly denied. Petitioner then failed to appear for his hearing by his own choice. Having

intentionally defaulted, petitioner cannot demonstrate that he had reasonable cause for his failure to appear at hearing.

D. Petitioner has also failed to demonstrate that he has a meritorious case. Section 659 of the Tax Law requires taxpayers to report changes in their Federal taxable income made by the Internal Revenue Service within 90 days of the final determination of such change and to concede the accuracy of such change or state wherein it is erroneous. Petitioner's Federal appeal rights have all expired and although petitioner continues to make repeated frivolous motions, these motions do not serve to extend petitioner's appeal rights. (*Golub v. Commissioner of Internal Revenue Service*, 2001 WL 376501 [DC Cir 2001]). Accordingly, the Federal changes became final and petitioner was required to report these changes to New York State. He failed to do so as required by section 659. Section 659 explicitly recognizes the possibility that a Federal change may not be accurate and allows the taxpayer the opportunity to demonstrate "wherein it is erroneous." Thus, petitioner had a second chance to dispute the Federal changes. Petitioner failed to take advantage of this second chance. Indeed, petitioner did not even address the merits of his case. Instead, he continued to argue that the New York assessments should be canceled because of his intention to file yet another motion to vacate the U.S. Tax Court's decision. Accordingly, I find that petitioner has not established a meritorious case.

E. It is ordered that the June 14, 2004 request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on May 20, 2004 is sustained.

DATED: Troy, New York  
August 26, 2004

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE